Sebor (Sarawak) Trading Sdn Bhd & Anor v Syarikat Cheap Hin Toy Manufacture Sdn Bhd

A

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS Q-02-374 OF 1995 AND Q-02-375 OF 1995
DENIS ONG, MOHD SAARI AND MOHD NOOR AHMAD JJCA
28 MARCH 2003

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Contract *— Breach — Carriage by sea — Missing goods — Responsibility of shipping agent — Whether second appellant negligent — Exemption from liability clause — Whether the respondent had sufficient notice of exemption from liability clause*

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One Chin Yew Choy entered into an oral agreement with the respondent whereby the respondent would supply fireworks and firecrackers ('the said goods') to a company in Sibu, Sarawak. Thereafter, the said goods were loaded into first appellant's vessel ('the ship') at Port Klang, Selangor. The necessary bill of lading ('the BOL') was prepared. The ship carrying the said goods sailed from D Port Klang to Sibu. On arrival, the ship discharged its cargoes including the said goods. The said goods packed in three containers were placed under the custody of the Rejang Port Authority ('the RPA') in the container yard of the RPA. Later, it was discovered that the said goods were missing from the three containers. At all material times, the second appellant was the shipping agent for the first E appellant. It was not in dispute that second appellant did receive the delivery order ('the DO') in respect of the said goods which were covered by the BOL. The respondent sued both the appellants for damages for breach of contract and negligence respectively. Judgment was entered against both them, hence this appeal. The issues for F determination were: (i) whether the second appellant was negligent; and (ii) whether cl 2(c) of the BOL absolved the first appellant from liability for the alleged breach of contract. The BOL which covered the said goods contained cl 2(c) which reads: '(c) in all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are G loaded on the ship and to cease absolutely on discharge when they are free of the ship's tackle.'

Held, allowing the appeal:

(1) It was the responsibility of a shipping agent to endorse the DO H for the purpose of claiming the said goods from the RPA. In this case, the signature appearing in the photocopy of DO was purported to have been endorsed by second defendant's senior clerk. The fact that the DO was not signed by the second appellant's senior clerk confirmed that the DO was a forgery. Had the trial judge directed his mind to this evidence which he I did not, his Lordship would have arrived at the same conclusion as did the Court of Appeal. Non-direction tantamounts to

misdirection. The second appellant was not negligent (see pp 490H–491B).

(2) The loss of the said goods was the work of person or persons unknown, who fraudulently removed them from the custody of the RPA. Thus, on the facts and circumstances of this case, the first appellant has established that there is cessor of liability covered by cl 2(c) of the BOL. It is true that no evidence was led that anyone had brought to the notice of the respondent regarding the exemption clause in BOL. However, the fact that a director of the respondent company had signed on the reverse side of the BOL which contained the exemption clause, it could be inferred that the director must have been aware of the said clause. On the facts and circumstances of the instant case, the court is satisfied that the respondent had reasonable sufficiency of notice regarding the exemption clause (see pp 492D–F, 493A–B).

[Bahasa Malaysia summary

Chin Yew Choy telah memasuki satu perjanjian secara lisan dengan responden di mana responden akan membekalkan bunga api dan mercun ('barangan tersebut') kepada sebuah syarikat di Sibu, Sarawak. Selepas itu, barangan tersebut telah dimuatkan ke dalam kapal perayu pertama ('kapal tersebut') di Port Klang, Selangor. Bil muatan ('BM tersebut') yang perlu telah disediakan. Kapal yang membawa barangan tersebut telah berlayar dari Port Klang ke Sibu. Apabila tiba, kapal tersebut telah memunggah kargo-kargonya termasuklah barangan tersebut. Barangan tersebut yang berada dalam tiga kontena diletakkan di bawah kawalan Pihak Berkuasa Pelabuhan Rejang ('PBPR') di limbungan kontena PBPR. Kemudian, ia didapati bahawa barangan tersebut telah hilang daripada ketiga-tiga kontena tersebut. Pada setiap masa matan, perayu kedua adalah ejen perkapalan untuk perayu pertama. Ia tidak dipertikaikan bahawa perayu kedua telahpun menerima nota penghantaran ('NP tersebut') berhubung barangan tersebut yang dilindungi oleh BM tersebut. Responden telah menyaman kedua-dua perayu untuk ganti rugi kerana melanggar kontrak dan kecuaian masing-masingnya. Penghakiman dimasukkan terhadap kedua-dua mereka, justeru itu terdapat rayuan ini. Persoalan-persoalan untuk ditentukan adalah: (i) sama ada perayu kedua cuai; dan (ii) sama ada fasal 2(c) BM tersebut membebaskan perayu pertama daripada liability kerana dikatakan telah melanggar kontrak tersebut. BM tersebut yang melindungi barangan tersebut mengandungi fasal 2(c) yang menyatakan: '(c) in all other cases the responsibility of the carrier whether as carrier or as custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely on discharge when they are free of the ship's tackle.'

Keputusan, membenarkan rayuan tersebut: A

(1) Ia adalah tanggungjawab ejen perkapalan untuk mengindorskan NP tersebut bagi tujuan menuntut barangan tersebut daripada PBPR. Dalam kes ini, tandatangan yang terdapat dalam salinan NP tersebut dikatakan telah diindorskan oleh kerani kanan defendan kedua. Hakikat bahawa NP tersebut tidak B ditandatangani oleh kerani kanan perayu kedua mengesahkan bahawa NP tersebut adalah palsu. Sekiranya hakim perbicaraan telah mengarahkan minda beliau kepada keterangan ini yang mana beliau gagal untuk berbuat demikian, hakim akan tiba kepada kesimpulan yang sama seperti Mahkamah Rayuan ini. Tidak mengarah adalah sama seperti salah arah. Perayu kedua C tidak cuai (lihat ms 490H–491B).

(2) Kehilangan barangan tersebut adalah perbuatan seseorang atau beberapa orang yang tidak dikenali, yang telah secara frod mengalihkan barangan tersebut dari kawalan PBPR. Oleh itu, berdasarkan fakta-fakta dan keadaan-keadaan kes ini, perayu D pertama telah membuktikan bahawa terdapat liabiliti yang dilindungi oleh fasal 2(c) BM tersebut. Adalah benar bahawa tiada keterangan telah dikemukakan bahawa terdapat seseorang yang telah memberi notis kepada responden tentang fasal pengecualian dalam BM tersebut. Namun begitu, hakikat bahawa pengarah syarikat responden telah menandatangani di bahagian E belakang BM tersebut yang mengandungi fasal pengecualian tersebut, bolehlah dibuat kesimpulan bahawa pengarah tersebut memang sedar tentang fasal tersebut. Berdasarkan fakta-fakta dan keadaan-keadaan kes semasa, mahkamah berpuas hati bahawa responden mempunyai notis yang munasabah berhubung fasal pengecualian tersebut (lihat ms 492D–F, 493A–B).] F

Notes

For cases on carriage by sea contracts, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue). G

Cases referred to

Australasian United Steam Navigation Co v Hiskens 18 CLR 646 (refd)

Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai [1997] 3 MLJ 61 (refd) H

Malayan Thread Co Ltd Sdn Bhd v Oyama Shipping Line Ltd & Anor [1973] 1 MLJ 121 (refd)

Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd [1959] MLJ 200 (refd)

Legislation referred to I

Rejang Port Authority (Condition of Business) By-Law 1971 s 35(1)

Carriage of Goods by Sea Act 1950 art IV r 5

Appeal from: Suit No 18 of 1990 (High Court, Sibu)

Michele Lau (*Lau & Co*) for the appellant/first defendant.
George Lim (*Battenberg & Talma*) for the appellant/second defendant.
Kho Lik Kiat (*Kho & Poh*) for the respondent.

Mohd Saari JCA (delivering judgment of the court): In the High Court, the plaintiff/consignor (the respondent in this appeal), sued the first defendant/carrier ('D1') and the second defendant/shipping agent ('D2') for damages for breach of contract and negligence respectively. Judgment was entered against both D1 and D2, hence this appeal.

The facts of the instant case were that on 15 April 1989, one Chin Yew Choy entered into an oral agreement with Syarikat Cheap Hin Toy Manufacture Sdn Bhd, the plaintiff in the High Court and the respondent herein whereby the respondent would supply fireworks and firecrackers ('the said goods') valued at RM457,800 to a company known as Hua Ho Co of No 76, Sg Antu, Sibu, Sarawak. Thereafter, the said goods were loaded into D1's vessel known as MV Kris Lemona ('the ship') at Port Klang, Selangor. The necessary bill of lading ('the BOL'), P1, was prepared. Later, the BOL together with the relevant invoices and customs declarations were submitted to the respondent's bank (Bangkok Bank) which in turn transmitted those documents to MUI Bank, Sibu, Sarawak.

On 20 April 1989, the ship (Kris Lemona) carrying the said goods sailed from Port Klang to Sibu and arrived on or about 25 April 1989. On arrival, the ship discharged its cargoes including the said goods. The said goods packed in three containers were placed under the custody of the Rejang Port Authority ('the RPA') in the container yard of the RPA. Later, it was discovered that the said goods were missing from the three containers.

At all material times, D2 was the shipping agent for D1. It is not in dispute that D2 did receive the delivery order ('the DO') in respect of the said goods which were covered by the BOL. On 10 May 1989, the DO was found missing from D2's office.

The issues for determination are:

(i) whether D2 was negligent; and

(ii) whether cl 2(c) of the BOL absolved D1 from liability for the alleged breach of contract.

On the first issue

On this issue, the question posed is whether the DO which was missing had caused the loss of the said goods. In this regard, it is pertinent to advert to

the unchallenged evidence of DW1 (an executive with D2) on the procedure of taking goods out of the godown of the Customs Department Sibu ('the Customs') namely:

(i) a consignee named in the BOL must furnish the original BOL;

(ii) after the shipping agent and the consignee had exchanged documents, D2 was required to endorse the DO;

(iii) the Customs would check the relevant documents to ascertain whether the particulars contained therein tallied with the customs declaration;

(iv) the Customs would assign a registration number to all documents;

(v) the Customs would check the goods to ascertain whether it was dutiable.

At all material times, DW6, an Assistant Superintendent of Customs, was attached to the godown section at the RPA. In the evidence of DW6, he said that in the case of prohibited goods such as firecrackers, they had to be cleared by the Customs. Without the Custom's approval, the RPA would not release the said goods. Further the original BOL had to be produced. Looking at the photocopy of the DO (P10), he said that it had no Customs registration number which meant that the said goods mentioned in the BOL could not have gone through the Customs. DW6's evidence was reinforced by the evidence of DW5, the Superintendent of Customs.

DW7 was a senior shipping clerk in charge of all delivery orders received by D2. He testified that he received the original DO in respect of the said goods. He could not explain how the DO in respect of the said goods went missing. In any event, he said that the signature appearing in the photocopy (P10) was not his. As a senior clerk in charge of delivery orders, he had the authority to sign the DO for transmission to the RPA.

From the above stated evidence, it is apparent that, even if it is true that the original DO was lost due to the carelessness of DW7, we hold that such loss is of no consequence for the following reasons:

(i) the fact that the photocopy (P10) was not assigned with the Customs registration number clearly showed that whoever was responsible for removing the said goods from the container yard of the RPA, did so without clearance from the Customs and the RPA;

(ii) the original BOL and the invoices were kept by MUI Bank pending payment for the said goods by the consignee in exchange for the documents. Thus, whoever claimed the said goods from the RPA was not in possession of valid documents.

In order to meet the requirement of s 35(1) of the Rejang Port Authority (Condition of Business) By-Law 1971, it was the responsibility of a shipping agent to endorse the DO for the purpose of claiming the said goods from the RPA. In this case, the signature appearing in the photocopy of DO (P10) was purported to have been endorsed by DW7. The fact that

A the DO (P10) was not signed by DW7 confirmed that the DO (P10) was a forgery.

We are of the view that had the learned trial judge directed his mind to the evidence as enumerated above which he did not, his Lordship would have arrived at the same conclusion as we did (see *Dr Shanmuganathan v* B *Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61). Non-direction tantamounts to misdirection.

On this issue, our finding is in the negative, that is to say, that D2 was not negligent.

C *On the second issue*

The BOL (P1) which covered the said goods contained cl 2(c) which reads:

> ... in all other cases the responsibility of the carrier whether as carrier or as
> D custodian or bailee of the goods shall be deemed to commence only when the goods are loaded on the ship and to cease absolutely on discharge when they are free of the ship's tackle.

The learned counsel for the respondent/plaintiff submitted that cl 2(c) of the BOL had no application as non-delivery of the said goods would E tantamount to defeating the fundamental object of the contract to wit the proper delivery of the said goods to the consignee.

In support, he cited Privy Council's case of *Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd* [1959] MLJ 200.

In *Malayan Thread Co Ltd Sdn Bhd v Oyama Shipping Line Ltd & Anor* F [1973] 1 MLJ 121, the facts of that case were that the plaintiffs shipped cotton sewing thread on the first defendant's ship to be conveyed from Kobe in Japan to Port Swettenham in Malaysia. On arrival at Port Swettenham, the goods were discharged from the ship. Later, after the ship had discharged the goods at the port but before the delivery of the goods to G the consignee, 15 cartoons of the goods were stolen by a person or persons unknown. The first defendant inter alia relied on cl 15 of the BOL. Clause 15 provided that 'the ship liability shall cease as soon as the goods leave the ship's deck and/or tackle'.

In that case, Raja Azlan Shah J (as he then was) at p 122 said:

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> And it is no less prima facie within clause 15:
>
> > 'In any case the company's liability shall cease as soon as the goods leave the ship's deck and/or tackle.'
>
> The words in that clause are very clear and adequate for the purpose and it must be held to be operative and effectual to protect the first defendants I (see *Chartered Bank of India, Australia and China v British India Steam Navigation Co Ltd* [1909] AC 369). In that case, the exemption clause reads, inter alia:

> 'In all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackle.'
>
> The goods were discharged at Penang and stored in a shed on the jetty and they were stolen by a servant of the landing agents. It was held that the fraudulent misappropriation by the servant of the landing agents was not treated as the fraudulent act of the shipping company, who were thereby protected by the exemption clause from any liability whatsoever.

On the question of fundamental breach, in the same case, his Lordship Raja Azlan Shah J observed (at p 122):

> In *Sze Hai Tong Bank*'s case, the shipping agents released the goods against a banker's indemnity when they knew fully well that they ought not to do so except against the appropriate bills of lading.
>
> Thus, where the servant or agent had deliberately flouted one of the bounden obligations of the contract, then that act is referable to the principal's act; in such circumstances, the principal cannot take refuge under an exemption clause.

From the above, it can be seen that in *Sze Hai Tong*, the shipping agent wrongfully released the goods. Unlike that case, here, the loss of the said goods was the work of person or persons unknown, who fraudulently removed them from the custody of the RPA. In this regard, with greatest respect, we disagree with the learned judge's finding when he said (at p 202):

> [In my view, clause 2(c)] must therefore be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract. ... It must at least be modified so as not to permit [the first defendant as] the shipping company [and/or its agent, in the circumstances of this case] ... to disregard its obligations as to delivery.

Thus, on the facts and circumstances of this case, we hold that D1 has established that there is cessor of liability covered by cl 2(c) of the BOL (P1).

On sufficiency of notice

Chitty on Contracts (24th Ed) Vol 1 at p 679 states:

> Reasonable sufficiency of notice
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> It is the third of these rules which has most often to be considered by the courts. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. But it is for the court, as a matter of law, to decide whether there is evidence for holding that the notice is reasonably sufficient.

Mr Kho, learned counsel for the respondent, submitted that the exemption clause (cl 2(c)) which was stated on the reverse side of the BOL (P1) must

be brought to the notice of the respondent at time of entering into the contract. It is true that no evidence was led that anyone had brought to the notice of the respondent regarding the exemption clause in BOL (P1). However, the fact that PW4 (a director of the respondent company) had signed on the reverse side of the BOL which contained the exemption clause, it could be inferred that PW4 must have been aware of the said clause. It is noted that in preparing the BOL, standard format was used and it could be argued that the respondent must have been familiar in sending goods by sea, which involved high risks. On the facts and circumstances of instant case, we are satisfied that the respondent had reasonable sufficiency of notice regarding the exemption clause.

On quantum

Our attention was drawn to cl 16 of the BOL. Clause 16 provides that the liability shall not exceed the invoice value of sterling £100 per package or unit. Such condition is consistent with r 5 of art IV of Carriage of Goods by Sea Act 1950 which reads:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

In *Australasian United Steam Navigation Co v Hiskens* 18 CLR 646 at p 678, Issacs J observed:

> If he (the shipper) does not state their value above that sum, it is an admission that they are not worth more. He has a fair option, so long of course as the extra freight is not unreasonable. It is not an exemption from liability; it is an agreement as to value made between the owner who knows and the carrier who does not and the freight is proportionate to the value.

In *Marine Cargo Claims* (3rd Ed) by William Tetley, the learned writer at p 641 says that a container is a package.

Looking at the BOL, it is observed that nowhere in the BOL (P1) was the value of the goods stated. Further, there was no mention of packages or units. From the BOL, what was clear was that the said goods were packed in three containers. Thus, in case we err on finding of liability, we hold that the respondent is entitled to £300 or its equivalent amount in Malaysian currency for loss of the said goods at the rate of exchange prevalent at the time of such loss.

Conclusion

For reasons given above, we allow both appeals with cost here and in the court below and set aside the order of the High Court. Deposit to be refunded to the appellants.

My learned brothers, Denis Ong and Mohd Noor Ahmad JJCA have read this judgment in draft and have expressed their agreement with the same.

Appeal allowed.

Reported by Peter Ling